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COPARCENER'S RIGHT TO SUE FOR SEPARATE MAINTENANCE

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Non-existence of right assumed

It is somewhat strange that the competency of a suit by a coparcener for separate maintenance has seldom come up for examination by Courts of law in the past. It seems to have been more or less assumed generally that among the male members of an ordinary undivided Hindu family a suit by one member against another for maintenance is not sustainable.[1] Adverting to the view that where a member could have sued for partition he could not sue for maintenance, the criticism has been made:

> "But it is difficult to see why a coparcener, who is willing to continue as a member of an undivided family should be driven out of it by what must be wrongful conduct on the part of the manager in refusing him his proper support out of the family funds."[2]

The question arises whether there is any basis at all to warrant the view referred to.

Nature of coparcenary

According to the true notion of an undivided family in Hindu law, no individual member thereof can predicate of the joint and undivided property that he has any certain and definite share therein. The proceeds of the undivided property must be brought into the common chest and applied for the purposes of the family.[3] Until the joint status is disrupted each coparcener has a right to common possession and enjoyment of the

1. West and Buhler, Hindu Law, 4th edn., p. 603.
2. Mayne, Hindu Law, 9th edn., p. 658, para. 458.
3. *Appovier* v. *Ramasubbier*, (1866) 11 Moo I.A. 75 at 89 (P.C.).

coparcenary property.[1] If any coparcener is excluded from joint possession he need not sue for partition but he can sue for a declaration of his right to such possession.[2] He may also obtain an injunction to restrain the manager from obstructing him in the joint enjoyment of the property.[3]

Participation in income

No coparcener is entitled to any definite share of the income of the family property.[4] Nor is there any obligation on any member of the family to stir a finger if he does not feel so disposed, either for his own benefit, or for that of the family; if he does do so he gains thereby no advantage; if he does not do so he incurs no responsibility; nor is any member restricted to the amount of the share which he is to enjoy prior to division.[5] A coparcener has no right to demand an account of the family income; even where it exists it is only as incident to the right to require a partition.[6] His interest, however, carries with it the inchoate right to raise an action of partition and that until partition is *de facto* accomplished he has a right to maintenance. This is an *inherent quality of the right of coparcenary*—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, the coparceners have a right, till they exercise their right to divide to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family, who is invested with the management.[7]

Remedy on infraction of right

The right being so declared, the question arises as to the remedy available to a coparcener for its enforcement should there be an infraction of it. The resort to an action for partition being a drastic remedy can only be thought of as a last step. Still, it has been stated that a son who can sue for partition cannot sue for maintenance, but where he cannot sue

1. *Katama Nachiar* v. *The Raja of Shivaganga*, (1863) 9 Moo.I.A. 539 at 543, 615.
2. *Naranbhai* v. *Ranchod*, (1901) I.L.R. 26 Bom. 141 at 144.
3. *Anant.* v. *Gopal*, (1894) I.L.R. 19 Bom. 269; *Ganpat* v. *Annaji*, (1898) I.L.R. 23 Bom. 144 and *Soshi Bhusan Ghose* v. *Gonesh Chunder Ghose*, (1902) I.L.R. 29 Cal. 500.
4. *Pirthi* v. *Jowahir*, (1887) L.R. 14 I.A. 37: I.L.R. 14 Cal. 493 (P.C.).
5. *Ranganmani Dasi* v. *Kasinath Dutt*, (1868) 3 Ben.L.R.O.C. 1.
6. *Soorjeemoney Dossee's case*, (1857) 6 Moo.I.A. 526.
7. *Rama Rao* v. *Raja of Pittapur*, (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

for partition he is entitled to sue for maintenance.[1] If a right to maintenance is an inherent right of every coparcener it is difficult to perceive why he cannot enforce that right by suit and what paramount or compelling reason there can be to make it desirable that he should sue for partition only. The proposition rests on the authority of a decision of the Bombay High Court referred to in *Himmatsingh* v. *Ganpatsingh*[2]. According to it a suit by a coparcener against others for maintenance will not lie unless he were indeed illegitimate, or suffering from some other disability to enforce partition. In *Himmatsingh* v. *Ganpatsingh*,[3] the property out of which maintenance was sought was impartible and there was no possibility of partition. It was held that a suit for maintenance would be competent. Adverting to the earlier case[2], the Court merely observed:

> "We say nothing as to the right of a son to sue for maintenance where he might sue for partition,"

thereby leaving the point open. In *Ramachandra* v. *Gopal Vaghs*, under the impression that *Himmat Singh's case*[3] allows a suit by a coparcener for separate maintenance to be brought generally, Pinhey, J., observed:

> "I think it not at all improbable, that in some future case, when the point is further considered and exhaustively argued, . . . the authority of *Himmatsingh* v. *Ganpatsingh*[3] will be shaken. And I should be glad to see that case overruled, for the rule which it lays down appears to me to be subversive of Hindu society and very injurious. I can conceive nothing more fatal to the happiness of Hindu family life than for this Court to affirm the principle that a Hindu father is liable to have to provide for each of his sons a separate maintenance, while the sons may choose to live a life of idleness and probably in consequence . . . . a life of vice."

The criticism fails to notice that there is no obligation whatsoever on any coparcener to exert himself[4], and that his right to maintenance is an inherent quality of his coparcenership.[5] It is also unduly swayed by the theory of parental authority over children. In *Bhupal* v. *Tavanappa*,[6] it was held that inasmuch as under the Bombay law a son cannot sue for partition, he can sue for maintenance on being driven out of the family. The decision does not state that if he could have sued

1. Mayne, Hindu Law, 10th edn., p. 825, para. 685; Mulla, Hindu Law, 8th edn., p. 582.
2. (1875) 12 Bom.H.C. 94 at 96 note.
3. (1877) I.L.R. 2 Bom. 346.
4. (1868) 3 Ben.L.R. O.C. 1.
5. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
6. (1921) I.L.R. 46 Bom. 435.

for partition he could not sue for maintenance. In a still later case,[1] the Bombay High Court has laid down, on an application by a District Magistrate under S. 88 of the Indian Lunacy Act, for separate maintenance for a lunatic son, that such maintenance should be decreed, that a father *as manager of the joint family* is bound to maintain the son, and that the obligation is independent of any consideration whether on account of the son's lunacy the father should maintain him as a person disqualified to sue for partition. This decision does not lend countenance to the view that a suit for separate maintenance will be competent only where a suit for partition will not lie.

In *Bhagwan Singh* v. *Mst. Kewal Kaur*[2], a coparcener's widow sued for separate maintenance for herself, her infant son and daughter. The suit was decreed on the ground that the manager's obligation to maintain was absolute. The point, however, does not seem to have been raised whether it is not a suit for partition on behalf of the son that should have been brought. In *Harendranath Avasti* v. *Shibo Sundari Debi*[3], it was held by the Calcutta High Court that an adult coparcener cannot bring a suit for separate maintenance. The learned Judges observed:

"The only other question is whether he can claim a monthly sum by way of maintenance. We are clearly of opinion that he cannot No authority has been cited for the proposition that a male member of a joint family who refuses to remain joint in food is entitled to separate maintenance out of the family funds."

Here again the decision rests on assumption and the absence of authority to the contrary.

So far as Madras is concerned, in *Subbayya* v. *Marudappa*[4], Varadachariar, J., observed:

"It is doubtful if a son can maintain a suit for maintenance against the father when he could as well sue for partition."

The reasons for the doubt raised are not given and probably it was engendered by the statement of the position in the text-books. In *Cherutty* v. *Nagainparambil Raru*,[5] the plaintiff sued for separate maintenance for himself, his minor son and others against the manager of the joint family. It was

1. *Chanvir Gavda* v. *District Magistrate, Dharwar*, (1926) I.L.R. 51 Bom. 120.
2. (1927) I.L.R. 8 Lah. 360.
3. (1909) 3 I.C. 378 at 380.
4. (1936) 71 M.L.J. 568: I.L.R. (1937) Mad. 42.
5. (1939) 1 M.L.J. 683.

held by the High Court in the first instance that the suit was incompetent, that so far as the adult coparcener was concerned his remedy on denial of maintenance was to sue for partition, and that as regards the minor coparcener the suit should have been in the alternative either for partition or for maintenance, as the Court may decide. This decision has however been recently reversed in Letters Patent Appeal and it has been held that even an adult coparcener can sue for separate maintenance.[1] As a direct and authoritative exposition the decision is invaluable. The manager occupies a position analogous to that of a trustee.[2] He may in fact be compared to a quasi-trustee subject under Ss. 95 and 96 of the Trusts Act to obligations similar to those of a trustee and as such enabling the beneficiary to compel him to perform his acts of duty under S. 61 of the Act. It is also true that there is no reason founded on sound principle, why a Hindu coparcener who is excluded from the enjoyment of his rights should against his will be driven to sue for partition, to secure relief.[3] This will however be a double-edged consideration. If to keep the family unbroken the coparcener is allowed to sue for separate maintenance, it may be that the manager will find the family discipline undermined and a lack of co-operation and team work —which are the ideals of a joint family—promoted, making his position difficult and compelling him to sever himself from the family.

Right to sue for separate maintenance should not be absolute

It is desirable that the coparcener's right to sue for separate maintenance should not be construed as an absolute right, but one depending upon the facts of each particular case. If the coparcenary property is impartible or if the coparcener is disqualified from enforcing a partition or is a minor there is no dispute that a suit for maintenance will be competent. It is only in the case of an adult coparcener that the necessity for a limitation will arise. Where he is excluded or driven out of the family there will be justification for allowing him to sue for

1. (1939) L.P. Appeal 96 of 1938: 50 L.W. Short Notes p. 84.

2. *Chuckun Lal Singh* v. *Porun Chunder*, (1848) 9 W.R. 483; *Krishna* v. *Subbanna*, (1884) I.L.R 7 Mad. 564; *Annamalai* v. *Murugasa*, (1903) 13 M.L.J. 287: L.R. 30 I.A. 220: I.L.R. 26 Mad. 544 (P.C.); *Perrasu* v. *Subbarayudu* (1921) 41 M.L.J. 33: L.R. 48 I.A. 280: I.L.R. 44 Mad. 656 (P.C.).

3. *Naranbhai* v. *Ranchod*, (1901) I.L.R. 26 Bom. 141.

separate maintenance. But where maintenance is not in fact denied or joint family life has no attractions for a coparcener it is difficult to see why he should not be asked to sue for a partition.

Quantum of maintenance

Where separate maintenance is allowed a question may arise as to its quantum. Obviously this will depend upon the resources as well as the needs of the family as a whole. The liability to maintain the coparcener is not however limited to the income of what would have been his share on a partition of the family property.[1]

SUMMARY OF ENGLISH CASES.

WRIGHT *v.* NEW ZEALAND FARMERS CO-OPERATIVE ASSOCIATION OF CANTERBURY, LTD., (1939) A.C. 439.

Guarantee—Continuing guarantee applicable to "the balance that is now or may at any time hereafter be owing"—Limitation—Commencement—Contract of sale by mortgagee in pursuance of his powers under mortgage—Rescinding from contract and re-sale at a lower price to new purchaser—Mortgagee if accountable for purchase-money under first sale.

Where a guarantee is to apply to the balance which at any time thereafter is owing, the question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted, and the number of years which have expired since any individual debit was incurred is immaterial.

There is no legal or equitable principle upon which can rest the proposition that a mortgagee who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is accountable to the mortgagor for purchase money which he has never received.

MAURICE *v.* GOLDSBROUGH MORT & CO., LTD., (1939) A.C. 452.

Insurance—Goods held on commission by bailee—Insurance by bailee—Loss by fire—Extent of insurance—Respective rights of wool grower and wool broker in the insurance money.

The appellants were wool growers who consigned 123 bales of wool to the respondents, wool brokers, in whose store they were des-

1. Mulla, Hindu Law, 8th edn., p. 582; *Chanvir Gavda* v. *District Magistrate, Dharwar,* (1926) I.L.R. 51 Bom. 120.

troyed by fire. The respondents had paid the expenses of the road and rail carriage to the store and in their name insured the wool along with that of other clients. After the fire the respondent claimed to deduct from the insurance moneys collected by them, commission which they would have earned on sale and charges which they would have been entitled to make for receiving, weighing, lotting, appraising value, etc., if the wool had not been destroyed. The appellant disputed the claim on the ground that the commission had not been and could not be earned and the other charges were deductible from the insurance moneys only as to services actually performed. The policy stated that loss or damage was not to include profit of any kind.

Held, the policy does not cover profits but only the wool. The position in the event of loss must depend on the terms of the contract and similarly the apportionment of that value between the appellant and the respondents must depend on the respective rights of property which the parties had at the date of the fire. The appellant was entitled to the whole of the insurance money and the respondents were not entitled to deduct the commission and other charges they would have been entitled to make if there had been a sale.

LADORE *v.* BENNET, (1939) A.C. 468.

Constitutional Law—British North America Act, 1867, Ss. 91 and 92—Provincial legislation to amalgamate four insolvent municipalities and make consequential provisions—Infringement on power of Dominion legislature—Effect on validity.

By 1935 four adjoining municipalities in Ontario each of which had raised loans for local purposes on debentures not charged upon municipal properties, were in acute financial difficulties and defaulted in payment of debenture interest and maturing principal. Various public utility corporations associated with the municipalities also were unable to meet demands on debenture issued by them. The Government of the province in its legislature passed the impugned statute, the City of Windsor (Amalgamation) Act, 1935, amalgamating the four municipalities into one, as the corporation of the City of Windsor. By S. 7 the Finance Commission was to arrange for the funding and refunding the debts of each of the municipalities by the imposition of rates on the rateable property in the area comprised in the respective old municipalities. By amending Act of 1936 the Finance Commission was abolished and its duties transferred to the department of municipal affairs, Ontario. Similar provisions were made for the public utility commissions. Some of the debentures were held by persons outside the province. The plaintiffs attacked the provincial legislation and the authority conferred in connection with the municipalities, as *ultra vires* as they invaded the field of

Dominion legislature as to (*i*) bankruptcy and insolvency [S. 91 (21)] and (*ii*) interest [S. 91 (19)] and (*iii*) were not within the exclusive powers of the province as they affected private rights outside the province.

Held, the province has exclusive legislative power in relation to municipal institutions in the province [S. 92 (8)]. If for strictly provincial purposes, debts may be destroyed and new debts created, it is inevitable that debtors should be affected whether the original creditors reside within or without the province. The pith and substance of the Ontario Acts are that they are passed in relation to municipal institutions in the province and so they are *intra vires*. As to their affecting the public utility companies, they will be justified as having been passed in relation to local works and undertakings under S. 92 (10) of British North America Act, 1867, and it was no encroachment on exclusive power of Dominion legislature over "interest" as it is directed *bona fide* to the effective creation and control of municipal institutions.

BUTLER *v.* THE KING, (1939) A.C. 484.

Constitution of Colonial High Courts—Trinidad and Tobago—"Acting Judge" if "Puisne Judge" of the Supreme Court capable of being member of Court of Criminal Appeal—Effect of ordinances.

By the Judicature Ordinances of 1880 the Supreme Court of Trinidad and Tobago consists of a Chief Justice and three Puisne Judges. There was provision in the ordinance for appointment of acting Judges as substitutes in case of vacancy. An ordinance of 1931 established a Court of Criminal Appeal the Judges of which were to be the Chief Judge and Puisne Judges of Trinidad and the ordinance contained no power to appoint an acting Judge to the Court of Criminal Appeal. The Court of Criminal Appeal consisting of the Chief Justice and two acting Judges appointed by the Governor to hear the appeal dismissed an appeal against a conviction for sedition. On appeal to the Privy Council,

Held, an acting Judge appointed by the Governor (not as a substitute for any individual) was not a Puisne Judge and cannot be a member of the Court of Criminal Appeal. As the Court of Criminal Appeal was not properly constituted the order dismissing the appeal against conviction should be declared void and of no effect.

REGIER *v.* CAMPBELL-STUART, (1939) 1 Ch. 766.

Principal and agent—Agent for purchase of house—Purchase by agent in name of another and re-sale to himself at higher price—Subsequent sale to principal at a further profit—Accountability of agent for secret profits.

In December, 1937, plaintiff's son who became friends with the defendant asked and the defendant agreed to find a house and from time to time sent particulars of houses. In January the defendant heard of and inspected a certain house, a leasehold having some years to run, at a ground rent of £125 and the price, as stated in the particulars by the house agents was £4,250. In the particulars sent to the defendant was a note that £2,500 would be accepted. The agents who had not been able to sell it in an auction early in 1937, had it in their hands to dispose of at the best price but had not received any serious offers. When the defendant through his wife inquired if the price of £2,000 would be accepted, they accepted it. On 10th January, 1938, a contract was entered into by the defendant in the name of his brother-in-law for purchase of the property. On 16th February, 1938, a contract was entered into between the defendant and his brother-in-law by which the defendant purported to buy the property from his brother-in-law for £4,500. On 19th January, 1938, the plaintiff returned to England from Russia and together with her son and defendant visited the house. The plaintiff's son was anxious to buy the house and the defendant said he had purchased it and his wife was unwilling to let it go. When plaintiff and her son pressed, it was finally agreed that defendant will sell the house to plaintiff for £5,000. Defendant told the plaintiff that the house had cost him £4,500 and wanted £500, partly as profits and partly as remuneration for services. On 24th February, 1938, a contract was entered into between plaintiff and defendant for the purchase of the house for £5,000 and a deposit was paid. Defendant then borrowed from his bank on the security of the contract a sum of £3,000 to pay off the original vendors, etc. Ultimately the plaintiff discovered the true facts, but without repudiating the contract for fraudulent misrepresentation, accepted the bargain and claimed damages and an account of the profits which the defendant had made as a result of the transactions.

Held, up to the sale, the defendant was the agent of the plaintiff and it is the duty of every agent to act honestly and faithfully to his principal, and if the agent conceals most material facts from his principal and by a fraud obtains an advantage to himself by purporting to sell, or by selling, property which is his own the duty which lies upon him is not ended by such contract and he remains liable to account for any secret profit which he has made as the result of his transactions between himself and the principal.

In re CAREW : CHANNER *v.* FRANCKLYN, (1939) 1 Ch. 794.

Wills—Legacies and annuities in the nature of settled legacies—Estate insufficient—Abatement.

The testatrix, over-estimated the value of her estate which was quite inadequate to provide the legacies she had given, subject to her sister's life interest and also the capital sums necessary to provide two annuities. On a construction of the will, held that the annuities were settled legacies of a capital sum adequate to provide the annuities, of which the annuitant was to be regarded as a life tenant, and are subject to abatement in the same way as any other legacy.

WESTHOUGHTON COAL AND CANNEL CO. LTD. *v.* WIGAN COAL CORPORATION, LTD., (1939) 1 Ch. 800 (C.A.).

Mines—Flooding of plaintiff's mines by water accumulating through artificial tunnel which has ceased to be under the control of the defendant—Liability.

Assuming that a mining lessee in the course of working his mine, artificially diverts a flow of water, whether in his own or a neighbouring mine by a work constructed solely for that purpose, with the result that the diverted water would, but for a precaution taken by the lessee, for example pumping find its way into a neighbour's mine and if the precaution is afterwards abandened so that the water does invade the neighbour's mine, he is liable. The defendants committed no wrong towards any one in making a tunnel and bringing water through it during the period they had control of the tunnel. But if the flooding of the plaintiffs' mines takes place by water accumulating by the flow through the tunnel, after the defendants have ceased to have any control over the tunnel, if the plaintiffs have a remedy against any one it is not against the defendants.

In re COOPER COLIN : LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK, LTD., AND OTHERS, (1939), 1 Ch. 811 (C.A.).

Wills—Secret trust—Revocation of will except regarding bequest to trustees on trust and increasing that bequest—If valid trust constituted in respect of the increased amount.

A subsequent will revoking an earlier one contained this clause :—"The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum.

Held, if a testator is minded to make use of the machinery of a secret trust, there must be communication to the trustees, acceptance by the trustees and the execution of the will or codicil in reliance of that acceptance. As these essentials were absent in the present case the gift as to the additional sum of £5,000 failed.

MARGINSON *v.* BLACKBURN BOROUGH COUNCIL, (1939) 2 K.B. 426 (C.A.).

Res judicata—*Third party proceeding by defendant against plaintiff in an earlier action—Subsequent suit by plaintiff in another distinctive capacity* —Res judicata—*How far applicable—Procedure—Recourse to shorthand notes in earlier suit not included in formal judgment—Propriety.*

In an earlier action in the County Court by owners of some premises for damages due to the collision against both the plaintiff and defendant, both denied liability and each alleged that the accident was solely caused by the negligence of the other. By third party notice they claimed against one another for indemnity or in the alternative contribution. In addition the present defendant claimed against the plaintiff damages in respect of damage done to their omnibus. It was held, both were to blame for the accident. The present action was brought (1) in respect of injuries and damages which the plaintiff alleged he had received by a collision (in which his wife was killed) between the plaintiff's motor car driven by his deceased wife and the defendant's omnibus driven by their servant due to the alleged negligence of the defendants' servant; (2) as personal representative of his wife's estate for loss of expectation of life under Law Reform (Miscellaneous Provisions) Act, 1934; and (3) under the Fatal Accidents Act on behalf of himself and his daughter as partial dependants of the deceased.

Held, in deciding a question of *res judicata* the Court is entitled to have recourse to information which is to be derived from reading a record of the proceedings in the earlier suit to find out what was actually decided in the earlier trial. The action can proceed so far as it is founded upon the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, but there is *res judicata* with regard to the claim for damages in the plaintiff's personal capacity.

UNION COLD STORAGE CO., LTD. *v.* SIMPSON, (1939) 2 K. B. 440 (C.A.).

Income-tax Act (1918), *Sch. D, Cases I and II, rr.* 6 (2), 6—*Wear and tear of machinery held on lease—Deductions—If lessee company entitled to.*

By a lease deed dated, December 29, 1921, two persons who had the voting control of the appellant company demised to the company for a term of 21 years the whole of the assets consisting of lands, freezing works, cold storage, factories, mills, etc., all over the world at a rent of £9,60,000 payable to 3 persons in Paris. The lease contains a full repairing covenant under which the lessees take the burden and undertake at the end of the lease to deliver up the whole demised premises with all additions and improvements. The com

pany claimed a deduction under Schedule D, Cases I and II, r. 6 in respect of the machinery and plant and that they were entitled to allowance for wear and tear. Reversing the decision of Macnaghten, J., the Court of Appeal upheld the claim of the company to the deduction.

(1933) 17 Tax Cases 488, Overruled.

HILL *v.* WOLVERHAMPTON CORRUGATED IRON CO., LTD., (1939) 2 K. B. 469 (C.A.).

Workmen's Compensation Act (1925), S. 11 (3)—Compensation to disabled workmen based on agreed pre-accident average weekly earnings—Increase in average rate of wage—Review—Matters for consideration.

For the purposes of review under S. 11 (3) of the Act, the actual periods during which the applicant worked in the 12 months preceding his accident should be taken into consideration, the wages earned in those periods being adjusted by substituting for the actual amounts earned sums ascertained on the increased rate.

COPEMAN *v.* COLEMAN, (1939) 2 K.B. 484.

Income-tax—Finance Act (1936), S. 21 (1) (9) (b) and (c)—Disposition in favour of children by allotment of shares in company—When a settlement under S. 21 (9) of the Finance Act, 1936.

In 1935, a company was formed with a capital of £1,000 in £1 shares held by the respondent and his wife to take over the respondent's business. At an extraordinary meeting on March 18, 1937, the capital was increased to £6,000, and it was provided that 25 preference shares should be created of £200 each entitled to a 10 per cent. preferential dividend and to participate with the ordinary shares equally in the surplus. The shares were allotted in consideration of £10 each in cash. Two such shares were allotted to the respondent's two children. On March 31, 1937, a dividend of 20 per cent. was declared free of tax, *i.e.*, each child received £40. Then a resolution was passed to call for £40 per preference share.

Held, this was not a *bona fide* commercial transaction and was a disposition or an arrangement in the nature of a disposition within the meaning of S. 21, sub-S. 9 though the settlements are made through the interposition of the company.

BATTY *v.* SCHRODER, (1939) 2 K.B. 495.

Income-tax—New partnership exercising option to treat trade of old partnership as discontinued—Loss in old trade if can be set off against profits of new trade.

A new partnership exercised the option under the Income-tax Act (1918), Sch. D, Cases I and II, r. 11 (1) to have the tax com-

puted as if the old trade had been discontinued and a new trade set up. In a claim by the new partners to set off the loss in the last year of the old partnership against profits in the new one,

Held, the right to set off losses against profits is only in respect of the trade in which the loss was sustained and the right cannot be claimed as against the profits of the new trade.

INLAND REVENUE COMMISSIONERS *v.* TRING INVESTMENTS, LTD., (1939) 2 K.B. 503.

Income-tax—Finance Act (1922), S. 21—Income of company deemed to be income of "members"—Person with an option to take shares—If such member.

Held, that a person with an option to take shares, is a person who had an interest in the capital of the company within the meaning of Finance Act, 1922, S. 21 (7) and as such a member of the company.

In re THE TRUNK ROADS ACT, 1936 AND *In re* THE LONDON-PORTSMOUTH TRUNK ROAD, (1939) 2 K. B. 515.

Land acquisition—Compulsory purchase order—Public enquiry—Procedure.

As the object of the inquiry was to hear objections to the proposals for the improvement for which the land was required it was not essential that evidence should be called on behalf of the Ministry. It was for the objectors to state their objections and to call such evidence as they might think proper in support of their objections.

BUSH BEACH AND GENT, LTD. *v.* ROAD, (1939) 2 K.B. 524.

Income-tax—Sum paid for cancellation of contract in ordinary course of business—If profits of business.

The appellant company received a payment of £4,500 for terminating a contract which was made in the ordinary course of business.

Held, the payment must have been in respect of the profits to have been earned under the contract and was liable to income-tax.

CAMPBELL *v.* SHELBOURNE HOTEL, LTD., (1939) 2 K.B. 534.

Tort—Invitees—Liability of owner of premises for negligence causing injury to invitee.

The plaintiff booked a room in the defendant's hotel on April, 24, 1938, proposing to stay there that night, the following day and the following night. He slept in the bedroom allocated to him on Sunday night and on the morning of Monday made his way to the lavatory but he did not notice the features on the way. He was out

of the hotel during the day and returned at 7 P.M. for dinner and went out again and returned at 11-20 P.M. After reaching his bedroom he had to go to the lavatory. There was no light in the passage leading to the lavatory. Plaintiff went to the other side of the passage and came by feeling, to a door, thinking it to be the door of the lavatory opened it and immediately fell into the basement below and was injured and suffered damage for which he sued the defendants. Originally his claim was based on negligence and by amendment was added alternatively a claim for breach of warranty. The defence was that there was no duty to plaintiff, there was no negligence on defendants' part and that the plaintiff was guilty of negligence himself and that his negligence was the sole cause of the accident and that plaintiff accepted the risk by going somewhere where he had no right to go and was therefore a trespasser.

Held, the plaintiff was an invitee and defendants owed the highest duty to take reasonable care that the premises were safe. Here there was no negligence on the part of the plaintiff and the plaintiff is entitled to succeed upon either on the ground of negligence or on the ground of warranty.

KAWASAKI *v.* BANTHAM STEAMSHIP CO., LTD., (1939) 2 K.B. 544 (C.A.).

Charterparty—Liberty to cancel "if war breaks out involving Japan"—Construction.

The fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out between China and Japan. The word "war" in the charterparty must be construed having regard to the general tenor and purpose of the document in what may be called a common sense way and not by obscure and uncertain technicalities of international law.

Decision of Goddard, J., affirmed.

SWAIN *v.* SOUTHERN RAILWAY CO., (1939) 2 K.B. 560 (C.A.).

Railway Company—Duty to maintain road on bridge and approach thereto—Liability for accident due to negligence or default—Public Authorities Protection Act (1893), S. 1—If railway company a public authority.

The defendant Railway Company obtained Parliamentary powers to make the line, which they made hoping to derive profits for shareholders. As one of the terms upon which they obtained their franchise, there was imposed upon them the duty of erecting and maintaining bridges and their approaches. The plaintiff who sustained injuries from a fall from his bicycle by reason of the fact that the wheels got into a rut in the road, on a bridge claimed damages on the alleged

negligence of the defendant company to fulfil their obligation to maintain the roadway.

Held, the railway company is not a public authority and is not placed in the position of a surveyor and the suit does not fail by reason of its not having been commenced within six months of the neglect or default complained of. The principle that a road surveyor or a local board or a public corporation responsible for the repair of roads is not liable to a person injured in respect of non-feasance has no application to a company carrying on its business for profit and the defendant is liable for non-feasance also.

HOWELLS *v.* INLAND REVENUE COMMISSIONERS, (1939) 2 K.B. 597.

Income-tax—Income-tax Act (1918)—All Schedules Rules, R. 21—Mortgagee acting as solicitor for mortgagor in a sale—Retention of money out of sale proceeds for interest due to him—If solicitor agent of mortgagor bound to pay the tax for the interest within the meaning of all Schedules Rules, r. 21.

All Schedules Rules, r. 21 provides : "upon payment of any interest of money..............the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment." The appellant, a solicitor, who was also the mortgagee, acted for his mortgagor in a sale and retained out of the sale proceeds some money in respect of the interest due to him.

Held, the appellant received the purchase money as solicitor for the mortgagor and in appropriating it to his own debt against the mortgagor was the person through whom the money was paid to the mortgagee. The appellant was bound to deduct the tax thereout and to account for it.

BARROWFORD HOLDINGS LTD. *v.* INLAND REVENUE COMMISSIONERS, (1939) 2 K.B. 607.

Income-tax—Finance Act (1922), S. 21 (6)—Subsidiary of foreign company—If "subsidiary company" within S. 21 (6)—Direction as to "undistributed income" of such company.

The subsidiary of a foreign company is not a subsidiary company within the meaning of the Finance Act, 1922, S. 21 (1) as amended by the Finance Act, 1927, S. 31 (3) and a direction as to undistributed profits can be made.

MAYER AND SHERRATT *v.* CO-OPERATIVE INSURANCE SOCIETY, LTD., (1939) 2 K.B. 627 (C.A.).

Workmen's Compensation Act (1925), S. 1 (1)—Date of disablement in a case where workman dies without obtaining a certificate of disablement—Date

of death, if date of accident—Insurer—Liability to indemnify—S. 1 (1) of the Act—Effect.

A workman after nearly a year's illness died from lead poisoning (found only on *post mortem* examination) in the course of his employment. Compensation to the defendants was awarded by the arbitrator against the employer who claimed that the defendant Insurance Company were bound to indemnify them under a policy of insurance. The Insurance Company contended that the workman must be deemed to have contracted the disease which caused his death on the day when he died, eight months after the policy had expired and so not liable under the policy. The contention was negatived and the Insurance Company was held liable. The Court of Appeal affirming the decision, *held*, the injury by lead poisoning was one sustained during the currency of the policy and the insurers were liable to indemnify under the policy. The proviso to S. 1 (1) that the employer shall not be liable under the Act in respect of any injury which does not disable the workman for at least three days has no bearing on the construction of the policy (which indemnified against all sums for which the employer shall be liable in respect of any personal injury by disease as described in the Act, sustained by the workman whilst engaged in the service of the insured).

PARDY *v.* PARDY, (1939) P. 288.

Divorce—Husband and wife—Separation deed—Effect on petition for divorce based on desertion.

Where a deed of separation has been entered into in a *bona fide* spirit between the parties, the Court cannot go behind the deed to inquire into facts which brought about the real division between the spouses, and where the spouses are living apart under a deed of separation the relationship begun by consent cannot be changed into desertion by a mere refusal of one party to resume co-habitation or by breach of the covenants of the deed. Such change can be effected only by repudiation by one and acceptance as such by the other in circumstances from which the inference can be drawn that the spouse accepting the repudiation is both in a position to insist on and is in fact re-asserting conjugal rights.

GREEN *v.* GREEN, (1939) P. 309.

Divorce on ground of insanity—Person under care and treatment in house maintained by Mental After Care Association—Period of detention—If interrupted.

On the facts the association was acting as agents of the London County Council in looking after the patient and the absence on trial

of the patient from the institution did not have the effect of interrupting the period of detention and the wife was entitled to a decree *nisi* for divorce.

WILLIAMS *v.* WILLIAMS, (1939) P. 315.

Divorce—Desertion—Insanity of deserting respondent—Effect on period of desertion.

In May, 1933, the respondent deserted his wife the petitioner. On June 26, 1934, respondent was certified under the Lunacy Act (1890) and put under restraint. The present proceedings were started on January 21, 1938.

Held, desertion such as will constitute a matrimonial offence must be wilful and no man who is without a mind can be said to form an intention, and thus be guilty of a wilful act.

PARKINSON *v.* PARKINSON, (1939) P. 346.

Divorce—Dissolution of marriage on the ground of presumption of death—Absence under deed of separation—If a bar—Burden of proof.

In a petition by husband for a decree of presumption of his wife's death and dissolution of marriage, where the party has merely disappeared for a period of 7 years or upwards the fact that the wife was absent under a deed of separation does not debar the petitioner from claiming a decree. It was for the petitioner to satisfy the Court that he had no reason to believe that his wife was living within the 7 years and on the facts the husband had produced evidence which entitled the Court to give a decree *nisi*.

LYNCH *v.* LYNCH, (1939) P. 355.

Divorce—Desertion—Existence of prior petition for nullity of marriage—Enjoyment of consortium by the spouses in the belief that petition had been dismissed —Effect on period of desertion.

Where the existence of a prior petition for nullity of marriage did not affect the husband's conduct and even if he did know of it, he disregarded it for the purpose of enjoying the society of his wife, that will not constitute a bar to the wife's suit based on desertion and even if it did constitute a bar, it was a mere technicality and the Court should not exercise the discretion in favour of a deserting spouse.

EAVES *v.* EAVES, (1939) P. 361.

Divorce—Desertion—Deed of separation—Abandonment of deed by resumption of co-habitation—Effect.

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Where (by the abandonment of a deed of separation by resumption of co-habitation) the Court comes to the conclusion that there was an intention by both parties to come together again, there would be an end of the deed and the wife is entitled to a decree for divorce on the ground of desertion.

JOTTINGS AND CUTTINGS.

The Late Mr. A. S. Viswanatha Aiyar.—It is with regret that we record the death recently of Mr. A. S. Viswanatha Aiyar who was for about fifteen years a reporter of this Journal. After taking his degree in Law in the Madras University, he was apprenticed to Sir P. S. Sivaswami Aiyar and then worked for some years as a junior under Mr. T. R. Venkatarama Sastri. He appeared in some very important cases with Sir Alladi Krishnaswami Aiyar. He was one of the reporters of the Law Weekly at its inception and joined as a reporter of the Madras Law Journal in 1915 and he continued as one till 1930. When the reportership of the Indian Law Reports, Madras Series, came to be filled up in 1931, he was appointed to one of the reporter's places. His work as a Law Reporter was marked by great care and thoroughness and his equipment both literary and legal was shown to its best advantage in the discharge of his duties. The learned Advocate-General and the Chief Justice of Madras paid eloquent tributes to his qualities and we respectfully join them in echoing those sentiments.

Sir John Astbury.—Time passes so quickly that it is difficult for an older reader to realise that 10 years have elapsed since Sir John Astbury, who died this week, was a Chancery Judge. Yet so it is. Astbury was a Manchester man and combined the attainments of the first-rate academic lawyer with the hard fibre and shrewd good sense of his native county. It was only just over 20 years after the date of his call that he went special on the Chancery side. His attainments in the realm of patent law made him a match even for the great Fletcher Moulton. On the Bench he was not distinguished, but will always be remembered for his decision in 1926, that a strike designed to coerce the Government is not a strike at all so as to claim the protection of the Trade Disputes Act (National Sailors, etc. *v.* Reed, 1926, Ch. 536). This bold decision was confirmed by Parliament the next year. Away from work Astbury was good company at after-dinner talks. Though at times inclined to overbear other talkers, his quick reply and versatile knowledge made him the pivot round which the wheel of conversation turned.—*L. J., 1939, p. 131.*

BOOK REVIEWS.

INDIAN STATES AND RESPONSIBLE GOVERNMENT by K. R. R. Sastry. Published by the author, Allahabad University. Price Rs. 5 —Inland, 7 *sh.* 6 *d.*—Foreign.

Mr. Sastry's book is a useful addition to the literature concerning Indian States. His statements that these are mostly medieval autocracies, whom *nemesis* will overtake should they persist in their folly, that they still exist owing to the might of the Paramount Power, that it is highly desirable that the fundamental civil rights of the people should be placed beyond jeopardy and that a minimum standard of civilised administration should be ensured for them, will find hearty approval. He is however on debatable ground when he says that he is not in favour of their abolition and that a federation alone can solve the Indian political problem. His conclusion that the Indian states have a sovereign status, quasi-international in character is not invulnerable. It is true that their territory is not British territory, that their subjects are not British subjects, that the laws of England do not apply to them and that the Indian Legislature can neither legislate for nor even discuss them. But is there not on the other side the fact that the Paramount Power has assumed power to create, abolish and abridge states, to control their external relations, protection and defence, to isolate them from one another, to exercise various kinds and degrees of extra-territorial jurisdiction within their states, to impose limitations on the powers of the latter regarding customs, salt, opium, currency and coinage, posts and telegraphs, employment of foreigners in service, etc., to control succession to states and take charge of minority administration, and to interfere in their internal affairs for the benefit of the states or their citizens, or of British India or of the Empire as a whole? To ascribe in the teeth of these facts a quasi-international status to the states as sovereign entities seems questionable. It is obvious that for sovereignty there must be a certain amount of independence, though it is quite consistent with sovereignty that the sovereign may in some respects be dependent upon another power and that there may be treaties or agreements limiting the powers of the sovereign even in internal affairs. It is curious that in the case of the Kelantan state, on facts almost parallel to those obtaining in the case of Indian States, the British Government should have regarded it as an independent and sovereign state—see *Duff Development Co.* v. *Kelantan Government* (1924) A.C. 797—whereas, in the case of Baroda they have regarded it as "not independent" but exercising various attributes of sovereignty—see *Statham* v. *Statham*, (1912) P. 92. Does not the declaration of Lord Canning in 1858, that the Crown stands "as unquestioned ruler and Paramount Power in India" suggest that

it is military strength and not cession or agreement or treaty that is the source of its power and that the states exist only by sufferance of the Crown. In the light of these facts it is certainly futile to argue with "remorseless logic in a purely legalistic vein" about the status of the states.

Apropos the treaties Mr. Sastry remarks that they are not personal (97); that they are not conveyances (99) but have the character of a contract (99). He adds that the actual relations arising thereunder have to be estimated in the light of the conditions prevailing at the time of their interpretation and not at the time when they were made (104). Will that not imply that it will be competent to the Paramount Power to enlarge their powers of interference in the internal affairs of the States, by giving an extended interpretation to the words "in the interests of the Ruler or his subjects or of British India or of the Empire as a whole"?

[END OF VOL. II.]